Nos. 18-1654 & 18-1782

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

FIRSTENERGY GENERATION, LLC,
Petitioner/Cross-Respondent,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

PETITION FOR REVIEW OF THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD IN *FIRSTENERGY GENERATION, LLC, A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP., AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 272, AFL-CIO*, CASE NOS. 06–CA–163303 AND 06–CA–170901, REPORTED AT 366 NLRB NO. 87

BRIEF OF PETITIONER/CROSS-RESPONDENT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the Sixth Circuit Rules, Petitioner/Cross-Respondent FirstEnergy Generation, LLC makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes.** If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: **FirstEnergy Generation, LLC is a wholly owned subsidiary of FirstEnergy Solutions Corp, which filed for bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code in the Northern District of Ohio (Lead Case No. 5:18-bk-50757), and which is no longer an SEC registrant. FirstEnergy Solutions Corp. is a wholly owned subsidiary of FirstEnergy Corp, a public company whose shares are traded on the New York Stock Exchange.**

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.** If yes, list the identity of such corporation and the nature of the financial interest: **Not applicable.**

CERTIFICATE OF SERVICE

I certify that on October 1, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ *Richard E. Hepp*

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REQUEST FOR ORAL ARGUMENT

Petitioner/Cross-Respondent FirstEnergy Generation, LLC respectfully requests oral argument in this matter pursuant to 6 Cir. R. 34(a). Oral argument is necessary given the unusual procedural history of this case, that the National Labor Relations Board's Decision and Order, which found that certain wage proposals were "inextricably intertwined" with retiree health care proposals, is based on an argument that was first raised by the General Counsel in its post-hearing brief, and that there is a dearth of evidence in the Agency Record supporting the Decision and Order. An oral argument would assist in identifying and explaining these issues and the unreasonable decision ultimately reached by the National Labor Relations Board.

STATEMENT OF JURISDICTION

This case arises under the National Labor Relations Act (the "Act"). On May 16, 2018, the National Labor Relations Board (the "NLRB" or "Board") issued its Decision and Order in *FirstEnergy Generation, LLC, a wholly owned subsidiary of FirstEnergy Corp., and International Brotherhood of Electrical Workers, Local 272, AFL-CIO*, Case Nos. 06–CA–163303 and 06–CA–170901 (the "Order"). On June 7, 2018, Petitioner/Cross-Respondent FirstEnergy Generation, LLC ("FirstEnergy" or the "Company") petitioned for review of the Board's Order. On July 11, 2018, the Board cross-petitioned for enforcement. Accordingly, this Court has jurisdiction over this cross-petition pursuant to Sections 10(e) and (f) of the Act, as amended (29

U.S.C. § 160(e) and (f)).

STATEMENT OF ISSUES

1. When a Company implements terms and conditions of employment after lawfully reaching impasse, must the Company also provide a cash benefit explicitly conditioned as a separate inducement to obtain a ratified collective bargaining agreement?

2. Is there substantial evidence to support the Board's finding that the separate ratification inducement offered here was so "inextricably intertwined" with retiree health care benefits, such that it must also have been provided upon impasse, even *without* ratification?

3. Did the Company violate the Act by using subcontractors, when the subcontracting was not a mandatory subject of bargaining, the use of such subcontractors was consistent with the collective bargaining agreement/implemented terms and past practice, and the Union failed to request bargaining?

STATEMENT OF THE CASE

On November 4, 2015, the Union filed a charge in Case No. 06-CA-163303, amended on February 29, 2016, alleging that FirstEnergy had violated Sections 8(a)(1) and 5 of the Act after the parties had reached impasse in bargaining. (AP[1]

[1] The Agency Record was filed with the Court on August 20, 2018 (Case No. 18-

Vol. II, p. 453.) On May 27, 2016, the Regional Director issued a Complaint and Notice of Hearing on the charge, and on June 9, 2016, FirstEnergy filed its Answer and Affirmative Defenses. (AP Vol. II, pp. 438-445; 429-434.)

On March 2, 2016, the Union filed a charge in Case No. 06-CA-170901, alleging that FirstEnergy had violated Sections 8(a)(1) and 5 of the Act regarding its use of subcontractors to perform work associated with its planned Unit 1 Outage at the Bruce Mansfield Plant. (AP Vol. II, p. 447.) On July 29, 2016, the Regional Director issued a Complaint and Notice of Hearing on the charge, and on August 11, 2016, FirstEnergy filed its Answer and Affirmative Defenses. (AP Vol. II, pp. 416-423; 407-412.)

The two charges were consolidated on November 10, 2016 (AP Vol. II, p. 403), and the matter was heard before Administrative Law Judge Andrew Gollin (the "ALJ") on December 1-2, 2016. (AP Vol. I, p. 67.) On March 15, 2017, the ALJ entered his Decision holding that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act. (AP Vol. I, pp. 67-99.) Following the filing of Exceptions, the Board issued its Order on May 16, 2018, affirming the ALJ's findings and adopting the ALJ's recommended order, basing itself upon one of the two rationales of the

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1654, Doc Nos. 12-1 to 12-7), and is included in the Appendix to FirstEnergy's Brief. Citations to the Appendix will be referred to as "AP" followed by the volume number and page number.

ALJ. (AP Vol. I, pp. 1-21.) On June 7, 2018, FirstEnergy filed its Petition for Review seeking a review of the Board's Order by this Court. (AP Vol. I, pp. 22-44.) FirstEnergy's brief now follows.

STATEMENT OF FACTS

A. The Parties

FirstEnergy owns and operates power generation facilities throughout Ohio and Pennsylvania, including the Bruce Mansfield Plant located in Shippingport, Pennsylvania ("BMP"). The Union represents certain production and maintenance employees at BMP for purposes of collective bargaining. There are approximately 230 employees in the bargaining unit.

FirstEnergy and the Union (collectively, the "Parties") entered into a collective bargaining agreement, effective by its terms from December 5, 2009 until February 15, 2013 (the "CBA"). (AP Vol. V, p. 1135 at ¶1.) On August 16, 2012, the Parties entered into a "stipulation of settlement" that extended the CBA with certain modifications through February 15, 2014. (AP Vol. V, p. 1135 at ¶2.)

B. The Parties Attempt to Negotiate A New Agreement

On December 19, 2013, the Parties commenced negotiations for a successor collective bargaining agreement. (AP Vol. V, p. 1135 at ¶3.) The Parties met ten (10) times prior to the expiration of the CBA, without success. (AP Vol. V, p. 1135 at ¶5; p. 1343.) The Parties nevertheless continued to negotiate, meeting an additional twenty (20) times between February 15, 2014 and September 18, 2015.

(AP Vol. V, p. 1343.) Despite these efforts, the Parties were unable to reach a successor agreement. (AP Vol. V, p. 1343.) Indeed, the Parties remained deadlocked on various issues, including retiree health care benefits, pension benefits, and FirstEnergy's ability to temporarily shift some of the bargaining unit employees at BMP to other FirstEnergy facilities, and vice versa. (AP Vol. V, p. 1343.)

During the long course of negotiations, FirstEnergy presented the Union with two (2) comprehensive settlement offers. The First Comprehensive Offer of Settlement was presented on September 25, 2014. (AP Vol. I, p. 257:9-10; AP Vol. III, pp. 706-939.) It contained a wage proposal stating that, effective upon ratification, there would be a General Wage Increase ("GWI") of 1.5 percent, a 1 percent GWI the year following ratification, and an additional 1 percent GWI two years following ratification. (AP Vol. I, p. 257:18-21; AP Vol. III, pp. 706.) FirstEnergy has a long-held policy of not offering wage increases retroactively, for there is otherwise no financial incentive to actually reach a ratified agreement. It thus explicitly uses the term "upon ratification" to indicate, as common sense would suggest, that the wage increases would only be paid prospectively as a signing bonus, if the Parties reach a ratified agreement. (AP Vol. I, p. 273:11-15.)

The Parties met again on December 8, 2014. (AP Vol. I, p. 261:14-25.) At this meeting, FirstEnergy presented modified proposals with respect to wages, including an "equity adjustment" to increase the wage rates by 75 cents per hour for

all job classifications effective, again, upon ratification. (AP Vol. I, p. 263:24-264:3.) FirstEnergy explained to the Union that the reason it was using the wage and equity package as a ratification inducement was because it wanted to move the wages paid to bargaining unit employees at BMP closer to the wages paid to similarly situated employees at FirstEnergy's nearby power generation plant in Stratton, Ohio (the "Sammis Plant"). (AP Vol. I, p. 264:5-15.) The Union responded that the proposed equity adjustment "was not near enough." (AP Vol. I, p. 264:16-17.)

At the meeting, then-Union President and Chief Negotiator Herman Marshman ("Marshman") also sought compensation for FirstEnergy's proposal to eliminate "in-the-box" retiree health care, which Marshman knew to be "separate" from the GWI and equity adjustment proposals. (AP Vol. II, p. 590.) FirstEnergy responded that if the Union agreed to eliminate "in-the-box" retiree[2] health care by the end of that year (2014), FirstEnergy would provide (1) a $500 annual contribution to the Health Savings Account ("HSA") or 401(k) of bargaining unit employees enrolled in single medical coverage or (2) a $1,000 contribution to the HSA or 401(k) of bargaining unit employees enrolled in family coverage. (AP Vol.

[2] "In-the-box" is a term used by the Parties to refer to bargaining unit employees who retire during the effective period of CBA but continue to receive certain health care benefits through the remainder of the CBA term.

1, p. 263:9-23; AP Vol. II, p. 591.) Marshman called the proposal "insulting." (AP Vol. II, p. 591.) No agreement was reached.[3]

On July 7, 2015, Marshman met privately with Charles Cookson ("Cookson"), FirstEnergy's Executive Director of Labor Relations and Safety.[4] (AP Vol. I, p. 265:14-266:4.) At the meeting, Cookson provided Marshman with a one (1) page written summary of where the parties had left off in December 2014. At this point, the proposal relating to the elimination of retiree health care by the end of 2014 was off the table. (AP Vol. I, p. 266:17-267:14; AP Vol. II, p. 567.) Thus, the withdrawal of this conditional proposal severed any connection between retiree health care and proposed wage increases.

Marshman recognized this. At the meeting, Marshman proposed an equity adjustment of 12 percent plus a 3 percent GWI as a way to close what he perceived

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[3] Retiree healthcare, and issues relating to retirees "in the box" or "out of the box" had been a contested item in a prior period of time. *See, FirstEnergy Generation Corp and Local 272*, 362 NLRB No. 66 (2015). The case, delayed substantially by *Noel Canning*, 573 U.S. ____ (2014), affirmed an ALJ decision from 2009. However, that issue had been resolved long ago, and was no longer any more significant to the Parties' bargaining than operational issues, like mobile maintenance. One suspects that the Board's belated theory—see below—that the wage proposals were "inextricably linked" to retiree health care, of all things, was based more upon institutional memory than on actual facts in the Agency Record.

[4] Marshman was voted out by the Union before the current CBA was ratified. The entirety of the Board's case was developed under his tenure as President and Negotiator. Marshman has been found by both this Court and the NLRB to be untrustworthy. *See, Edison Co. v. NLRB*, 847 F.3d 806 (6th Cir. 2017) (discussed further below).

was a 12- to 15-percent wage gap between BMP bargaining unit employees and those at Sammis. (AP Vol. I, p. 268:13-20.) Significantly, Marshman's verbal counterproposal on wages also acknowledged the payment of the increases would be contingent upon ratification. (AP Vol. I, p. 268:21-24.)

In a follow-up meeting on July 21, 2015, Cookson presented a written proposal to address Marshman's concern about the perceived wage disparity between BMP and Sammis that included a more generous proposed equity adjustment of $1 per hour for all classifications, effective, as always, upon ratification. (AP Vol. I, p. 273:2-10; AP Vol. III, p. 940.) It also included a GWI of 5.5 percent upon ratification and a 2 percent increase one year after ratification. (AP Vol. III, p. 940.) FirstEnergy also maintained its proposal to contribute to the bargaining unit employees' HSAs or 401(k)s in exchange for eliminating retiree health care by October 31, 2015. (AP Vol. III, p. 940.) In other words, it was plain by July 2015 that FirstEnergy's wage proposals were entirely independent of its proposal related to retiree health care. Marshman again rejected FirstEnergy's proposal, in part because he said the proposed wage adjustment was not generous enough, and in part because he wanted the HSA and 401(k) contributions proposed by the Company to extend to retirees as well. (AP Vol. 1, pp. 275:22-276:7.)

The Parties met again on September 17-18, 2015. At this meeting, FirstEnergy presented its Second Comprehensive Offer of Settlement ("Second

Comprehensive Offer"), which included, among other things, a $1 per hour equity adjustment for all classifications, a GWI of 5.5 percent to be granted after the equity adjustments, and a GWI of 2 percent that would be granted one year after ratification. (AP Vol. V, p. 1207.) It likewise eliminated the retiree health care and, in return, provided for the contributions to the HSAs and 401(k)s of current bargaining unit employees. (AP Vol. V, pp. 1224-1225, 1227-1229.) FirstEnergy also provided a summary of the main points contained in the Second Comprehensive Offer. (AP Vol. V, pp. 1265-1267.)

Nowhere in the Second Comprehensive Offer or the summary does FirstEnergy link the wage adjustment proposals with retiree health care. Marshman made clear that the Parties remained "miles apart" on key issues. (AP Vol. I, p. 281:22-3.) As with the First Comprehensive Offer, Marshman never even submitted the Second Comprehensive Offer to the membership for a ratification vote. (AP Vol. V, p. 1137 at ¶9.)

C. FirstEnergy Implements Terms and Conditions of Employment

Given that negotiations were unsuccessful, that the Union was unwilling to schedule additional meetings, and, in the Union's words, that the Parties remained "miles apart," FirstEnergy determined that a *bona fide* bargaining impasse had been reached, a fact that today is not in dispute.[5] (AP Vol. II, p. 284:9-15.) Accordingly,

[5] In its charge for Case No. 06-CA-163303, the Union claimed otherwise, that the

FirstEnergy informed the Union on October 27, 2015, that it would implement the terms and conditions of employment contained in the Second Comprehensive Offer. (AP Vol. V, p. 211-213.)

The Implemented Terms were fully consistent with the Second Comprehensive Offer, including eliminating retiree health care in return for contributing annually to the HSAs and 401(k)s of current bargaining unit employees. (AP Vol. V, pp. 1268-1342, 1346-1348.) The Implemented Terms also included the exact language regarding the equity adjustment, GWI, and shift differentials included in the Second Comprehensive Offer. (AP Vol. V, pp. 1303, 1305.) However, the package of GWIs, equity adjustments, and shift differentials were not instituted, because they were only to be implemented if the contract was actually ratified. Of significance, the Company also did not implement its Mobile Maintenance proposal, a key item that FirstEnergy had bargained hard for in negotiations, because it would constitute a waiver of the Union's rights, which under current Board law cannot be implemented without agreement.[6]

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parties were not yet at impasse.

[6] The Mobile Maintenance proposal would have allowed the Company to establish a unit of maintenance employees that travelled from power plant to power plant, as needed. Other items which were not implemented for the same reason (that they constitute a waiver by the Union of its rights) include routine items that had already been in previous contracts, such as management rights, no-strike, and arbitration clauses. (AP Vol. V, pp. 1268-1342, 1346-1348.)

FirstEnergy provided bargaining unit employees written notification of the Implemented Terms going into effect. (AP Vol. III, pp. 550-552.) In this letter, FirstEnergy specifically informed bargaining unit employees that: (1) the Company's Second Comprehensive Offer remained on the table; and (2) that if an agreement was ratified, FirstEnergy would implement the wage package as proposed. (AP Vol. III, pp. 550-552.)

D. FirstEnergy Subcontracts Certain Unit 1 Outage Work

To meet its operational requirements, FirstEnergy's equipment at BMP is generally expected to operate 24 hours a day, seven days a week, for years at a time. (AP Vol. I, p. 127:12-16.) As part of its regular maintenance regimen FirstEnergy periodically conducts a full-train overhaul of its three turbines at BMP (each, a "Unit") which includes disassembling the entire Unit, inspecting and cleaning it, and then reassembling and closing the Unit. This generally occurs every nine years. (AP Vol. I, p. 140:16-19.) Historically, during every Unit overhaul both contractors and bargaining unit employees perform work. (AP Vol. I, p. 142:9-12.) At the same time, BMP still has its other two Units running at full capacity. In effect, during outages there is more work to be done than there are employees to perform it.

FirstEnergy planned to conduct a full-train overhaul of its Unit 1 turbine and generator in 2016 (the "Outage"). (AP Vol. I, p. 145:5-9.) Notably, this Outage was at least 10 times larger than the most recent outage of Unit 3 in 2014 and was the

largest turbine outage in about 10 years. (AP Vol. I, pp. 145:5-23.) The time period within which to complete the work associated with the Outage—56 days—was tied to FirstEnergy's obligations to supply power to the Pennsylvania, New Jersey, Maryland Interconnection ("PJM Interconnection"), a federally regulated and quasi-governmental regional transmission organization that regulates the regional electricity markets. (AP Vol. I, pp. 303:17-304:1.) Had FirstEnergy missed its target, it would have been subject to fines and penalties. (AP Vol. I, p. 304:5-6.)

FirstEnergy began planning for the Outage in January 2015. (AP Vol. I, p. 138:23-25.) As part of its analysis of the alternatives, FirstEnergy requested a proposal from General Electric ("GE") to rebuild Unit 1 during the Outage. (AP Vol. I, p. 139:23.) GE was the original equipment manufacturer and had built all of the turbines at BMP, including Unit 1. (AP Vol. I, p. 140:1-13.) It also has been a contractor in prior outages. And equally important, it also offered a two-year warranty for its workmanship associated with the Unit 1 rebuild. (AP Vol. I, pp. 140:6-11; 146:2-7.) FirstEnergy could not get a warranty if its own employees performed the work. (AP Vol. I, pp. 306:8-15.) Thus, due to factors including the scope, timing, and duration of the project, the constraints on using BMP employees, and GE's proposed warranty, FirstEnergy awarded the contract to GE. (AP Vol. I, pp. 299:23-300:2; 301:14-302:8.) Of note, because of these factors, including the aforementioned need for workers, the Company made this decision even though

labor costs were higher with GE than using BMP employees. (AP Vol. I, p. 306:3-7.)

In selecting GE, FirstEnergy also was acting in accordance with the terms of the expired CBA and well-established past practice. Article IV, Section D of the expired CBA provides, in pertinent part, as follows:

> It is the policy of the Company not to employ outside contractors for work ordinarily and customarily done by its regular employees where such contacting would result in the layoff or demotion of employees or the reduction of hours of work below forty (40) hours a week. Except in emergencies, the parties agree to meet prior to contracting out work and discuss the scope of the work (as to description, location, and estimated duration involved and the portion, if any, to be performed by bargaining unit employees).

(AP Vol. V, p. 1144. Emphasis added.) No layoffs or demotions occurred as a result of the subcontracting of work in connection with the Outage. To the contrary, all employees in the bargaining unit continued to work at least 40 hours a week. Furthermore, the great majority also had overtime and even declined overtime. (AP Vol. I, pp. 329:9-330:4; 330:7-20; 330:23-232:8; AP Vol. III, pp. 987-1000.)

The Union was well-informed of the potential use of subcontractors during the Outage. (AP Vol. I, p. 310:11-21; AP Vol. III, pp. 965-966.) Under the terms of the expired CBA and its past practice, FirstEnergy faxed spreadsheets containing contractor information to the Union every Friday informing them of contracting work that has been completed under emergency circumstances or to be completed in

the future. (AP Vol. I, p. 307:10-12, 20-22.) FirstEnergy also had a past practice of notifying the Union of subcontractors used on an outage about a month before the start of the work. (AP Vol. I, p. 307: 6-7.) FirstEnergy continued to follow this practice for the Outage. Indeed, as early as February 6, 2015—more than a year prior to the Unit 1 Outage—FirstEnergy notified the Union that work associated with the Outage would be contracted out. (AP Vol. III, pp. 965-966.) In total, the Company provided no fewer than ten (10) notification reports to the Union containing upcoming subcontracting, detailing more than 115 instances of Outage work being designated for subcontracting. (AP Vol. III, pp. 965-986.)

In addition to this, FirstEnergy also met regularly with the Union every Wednesday to discuss subcontracting. (AP Vol. I, pp. 323:21-324:4.) Indeed, as explained by Christopher Cox ("Cox"), FirstEnergy's Maintenance Manager at BMP, the purpose of providing the Union with notification reports and meeting regularly is to ensure that FirstEnergy and the Union are communicating concerns relating to subcontracting and addressing any Union questions. (AP Vol. I, p. 323:17-20.) Likewise, FirstEnergy also held three "all hands" meetings on June 15, 2015 which were attended by FirstEnergy's maintenance department, including bargaining unit employees, in which the Company explained the full scope of the planed Outage work. (AP Vol. I, pp. 368:23-369:11.)

Yet the Union never requested bargaining. Indeed, it was not until February

10, 2016, that the Union, for the first time, even *protested* any of the subcontracting, which is not the same as a request to bargain. (AP Vol. I, p. 325:10-22.) On that day, for the first time, the Union representative protested that the work should be done by the bargaining unit employees. (AP Vol. I, p. 165:6-9, 365:18-25.) To a man, each FirstEnergy supervisor testified that at no time prior to or after FirstEnergy's various notices to the Union, including at the February 10, 2016 meeting, did the Union ever protest the subcontracting, much less request bargaining. (AP Vol. I, pp. 324:16-19; 370:23-272:1; 377:13-20.)

Work began on the Outage on or about March 16, 2016 and continued until May 14, 2016. During the Outage all available bargaining unit employees remained fully employed and most worked voluntary and involuntary overtime. (AP Vol. I, p. 329:13-15.) Much of the work on the Outage was still performed by the Union. (AP Vol. I, pp. 329:18-330:4.) Of great import, FirstEnergy ultimately determined that bargaining unit employees would perform the inspection and overhaul of the boiler feed pump as part of the Outage, rather than GE as originally planned. (AP Vol. I, p. 329:7-12.)

Given the vast amount of work being performed on the Outage, fully 90 percent of bargaining unit employees had an opportunity to work on the outage. (AP Vol. I, pp. 330:13-20.) They also had a wealth of opportunities to work *overtime* during the Outage, to the point where employees were actually declining such

opportunities. (AP Vol. I, pp. 330:23-331:5; 334:24-335:3; AP Vol. III, pp. 987-1000.)

LAW AND ARGUMENT

A. Summary of Argument

FirstEnergy sets forth four (4) reasons why this Court should reverse the Board:

First, the law does not require post-impasse implementation of a cash benefit when that benefit was proposed as a signing bonus, and not a "term or condition of employment." No reasonable fact-finder could conclude that the proposed cash benefit conditioned upon ratification was "inextricably linked" to retiree health care.

Second, under the facts and circumstances of this case, the subcontracting at issue was not a mandatory subject of bargaining to begin with.

Third, the subcontracting was consistent with the Implemented Terms (and the previous CBA), which allowed the Company to subcontract so long as employees were working at least forty (40) hours a week. The employees at issue were working well above that amount, and were even declining enormous amounts of overtime opportunities. As a simple matter of operation, the Company had the right to subcontract.

Fourth, and finally, once informed of a proposed item concerning terms and conditions of employment—such as subcontracting—the law requires a Union to

request bargaining over it. If the Union fails to request bargaining, the item has been waived. The Company provided numerous notices of proposed subcontracting, all consistent with its past practice, and yet the Union only made a well-belated request after the subcontract had already been awarded and the work already begin. By law, the Company was permitted to subcontract.

B. Standard of Review

The Court of Appeals' standard of review for decisions of the NLRB differs between issues of fact and law. For questions of fact, as well as its application of law to a particular set of facts, the Board's findings must be supported by "substantial evidence." 29 U.S.C. § 160(f); *Universal Camera v. NLRB*, 340 U.S. 474 (1951); *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 400 (6th Cir. 2017). A reviewing court may set aside a Board decision "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera*, 340 U.S. at 488.

For questions of law, the standard depends on whether the Board has correctly interpreted the Act or judicial precedent. Though the Court grants due deference to its interpretations of the Act when they are reasonable, decisions of the Board are reviewed *de novo*. *Albertson's, Inc. v. NLRB*, 301 F.3d 441, 448 (6th Cir. 2002).

C. The Company is Not Required to Implement Every Item that was Discussed in Bargaining, and No Evidence Supports the High

Threshold Required to Say the Wage Package was "Inextricably Intertwined" to Retiree Health Care Benefits

In its Order, the Board accepted the ALJ's theory that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act by failing to implement the wage increases and shift differentials set forth in its Second Comprehensive Offer because they were, in the ALJ's words, "inextricably intertwined" with, and *quid pro quo* for, FirstEnergy's proposal to eliminate retiree health care.[7] (AP Vol. I, p. 1, fn 1.) The Board is profoundly mistaken in this fundamental aspect of the law.

The controlling case law established by this Court, as well as other Courts of Appeal, is perfectly clear: an employer is not required to implement its entire proposal after impasse is reached. *See, e.g., Borden, Inc. v. NLRB*, 19 F.3d 502, 512 (10th Cir. 1994), cert. denied, 513 U.S. 927 (1994) (as a matter of law, employer has the right to implement all or part of its final offer upon impasse); *Community General Hospital*, 303 NLRB 383, n.1 (1991) (employer's implementation of "certain terms" of its last contract proposal was not unlawful).

Instead, an employer is required to implement post-impasse only those terms and conditions of employment that were "reasonably comprehended within [its] pre-

[7] The Board's decision was bottomed only upon the ALJ's finding that FirstEnergy violated the Act by not implementing the wage and shift differential proposals. The Board did not pass on the ALJ's alternative theory that FirstEnergy had violated the Act by conditioning the wage proposals on ratification of a new collective-bargaining agreement. Thus, that issue is not before the Court.

impasse proposals." *United Paperworks Int'l Union v. NLRB*, 981 F.2d 861, 866 (6th Cir. 1992). Rather, as the Court has subsequently explained, the "reasonably comprehended" exception to the mandatory collective bargaining requirement merely requires an employer to implement terms that are consistent with the last, best, and final offer rejected by the bargaining unit:

> After the parties have bargained to impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are "reasonably comprehended within his pre-impasse proposals," and are consistent with the offers the Union has rejected …. Therefore, the employer may not implement changes "which are substantially different from . . . any which the employer has proposed during its negotiations . . . ."

NLRB v. Plainville Ready Mix Concrete Company, 44 F.3d 1320 (6th Cir.) (citations omitted)(emphasis added). In other words, the requirement is only that the implemented changes must be consistent, and within the ambit of, proposals or offers the union has already rejected. *NLRB v. Katz*, 369 U.S. 736 (1962); *Emhart Industries v. NLRB*, 907 F.2d 372, 376 (2d Cir. 1990).

Numerous cases illustrate this foundational rule of collective bargaining. In *Emhart*, the Court reversed a Board decision, finding that a certain plant rule "was 'reasonably comprehended' within [the employer's] November 1983 proposal, even if other aspects of that proposal were not also implemented." *Id.* Similarly, in *Presto Casting Co.*, 262 NLRB 346 (1982), *enforced in part and denied in part on other*

grounds, 708 F.2d 495 (9th Cir.), the union sought a flat pay scale with benefits rather than the merit pay system that the employer proposed and implemented. The General Counsel, comparable to the instant case, argued that the employer violated the Act by not implementing its benefits proposals. But the Board, with Court approval, found that the employer was privileged to implement a merit pay system that the union had rejected, even though the employer did not implement other portions of its economic proposal. *Id.* at 354-55.

None of the foregoing is in dispute. However, in less than a handful of cases, the Board has found that when certain proposals were "inextricably intertwined" with other proposals, then both those proposals must be implemented together. In *Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1340 (6th Cir. 1995)—the sole case cited by the Board in its sparse decision—the employer therein offered wage increases, as it explicitly stated in a written memorandum to its employees, "in lieu of gain sharing and incentive pay." Yet after impasse, the employer implemented only the elimination of incentive pay and gain sharing, and not the wage increase. The Court found that the wage proposals were "inextricably linked" components of a "comprehensive, integrated wage offer"—leading the union to "reasonably comprehend" that if gain sharing and incentive pay were eliminated, then the employer would implement the proposed wage increases. Accordingly, the Court found that choosing to implement only one part of the deal was unlawful. This is

the single case relied upon by the Board.[8]

Thus, the Board ignored the bedrock principle that an employer may choose to implement some but not all of its pre-impasse proposal, and instead applied the limited exception in *Plainville*. "Inextricably linked" is a significant phrase, and it must be given its full weight and meaning. It means that two proposals are reciprocal or symbiotic, such that one cannot be understood or contemplated without the other. The factual situation in *Plainville* is entirely different than here, as even the above few lines make self-evident. The unimplemented wage increase in that case was offered, by the employer's own written message to its employees, "in lieu" of another. No reasonable person could conclude that the Company's offer here of a cash package as a signing bonus for a ratified agreement—which was always explicitly severed from any other proposal—was "inextricably linked" to "retiree health care."

This case wasn't even prosecuted under such a theory. Indeed, retiree health care was never even raised, at any point, by any party, in the long procedural history of this case. It was not mentioned in the original Implementation Charge. It was not

[8] The Board also cited in passing *Cleveland Cinemas Management Co.*, 346 NLRB 785, a case which itself merely relied upon *Plainville*. In that case too, the employer had requested the Union agree to a service technician agreement, "in lieu of having dedicated projectionists at the theaters." *Id.* at 789. Likewise, the "in lieu" proposal in that case was put in writing and given to the Union. *Id.*

mentioned in the amended Implementation Charge. It was not mentioned in the Regional Director's dismissal letter. It was not mentioned in the amended dismissal letter. And, it was not mentioned in the Complaint. As the ALJ noted, the General Counsel raised this "theory" about retiree health care for the first time in its post-hearing brief. (AP Vol. I, p. 11, n. 24). As noted in the footnote below, this theory was not only not advanced by the General Counsel, but it was actually rejected by the Board, in explicit terms, before it was somehow resurrected in a way still never made clear.[9]

The record evidence clearly shows that FirstEnergy's pre-impasse proposals for GWIs, equity adjustments, and shift differentials were *not* "inextricably linked" to retiree health care. Nor was there any kind of integrated proposal whatsoever. Each proposal was a separate and distinct item in a comprehensive proposal that

[9] The allegations concerning the wage package were originally dismissed by the Board, along with other unfair labor practice charges filed by the Union, in Case 06-CA-163303. In its decision of March 11, 2016, the Board said: "You also allege that the Employer's partial implementation was unlawful because the Employer did not implement the wage and shift differential. Because the proposed wage and shift differential increases had been severed from other proposals and were independent of those other implemented terms and conditions, the evidence was insufficient to establish that the employer engaged in unlawful partial implementation its proposals." The Union appealed, but unconnected to the appeal, on April 11 2016 the Board *sua sponte* "amended its original dismissal letter" and "decided to retain for further processing" the allegation. Leaving aside the eyebrow-raising 180-degrees about-face, the disquieting procedural history before the Board should, respectfully, give more than a little pause to the Court.

covered myriad economic and non-economic issues. Indeed, the Union understood, very well, that retiree health care was separate and distinct from the wage proposals. That is why FirstEnergy offered in December 2014 to provide annual HSA and 401(k) contributions to employees if the Union agreed to eliminate "in-the-box" retiree health care by the end of 2014. Even inexperienced labor practitioners understand that these health-and-welfare items go hand-in-hand with each other. Those items, it might be argued, could be found inextricably linked. By contrast, the Board's finding that an entirely unrelated wage package was somehow "inextricably intertwined" with retiree health care is patently unreasonable and unfounded.

Arguendo only, to the extent that the wage proposals can even be said to have ever been related to anything, let alone "inextricably linked," it was to the wage rates paid at other FirstEnergy power generation facilities, and specifically, the Sammis facility. As Cookson explained, it had been a consistent theme of the Union since 2012, and particularly at the bargaining sessions in December 2014 and throughout 2015, to lessen the wage disparity between BMP bargaining unit employees and Sammis' employees.

In fact, with even a moment's contemplation, it becomes immediately apparent that to conclude that the wage package was offered "to compensate the Union for elimination of 'in-the-box' retiree health benefits" (AP Vol. I, p. 13) flies

squarely in the face of other factual determinations accepted by the Board, and runs at cross-purposes with them.

For one, the Board found, correctly, that the proposal of higher wages for eliminating retiree health care was actually withdrawn very early in the bargaining. As the Board indicated, a tiered wage proposal based on the elimination of retiree health care had expired by the end of 2014, "because the December 31, 2014 deadline has passed." (AP Vol. I, p. 7.) It is untenable to claim that two proposals were "inextricably linked" upon implementation in October 2015, when even the minimal relationship they allegedly bore to one another was clearly severed as of December 31, 2014.

Moreover, the Board also found that FirstEnergy's proposed wage increases were directly tied to the wages paid at other FirstEnergy locations, and *not* to retiree medical benefits. Indeed, as the Board stated, the thrust of FirstEnergy's equity adjustment proposals—and the reason why that vehicle in particular was offered as an inducement for ratification—was to "to bring them closer to the Sammis employees." (AP Vol. 1, p. 6, fn. 15.) The ALJ also found that "[t]he Union wanted to bring wages at the Bruce Mansfield facility closer to those at the Sammis facility." (AP Vol. 1, p. 6.)

The evidentiary record is replete with testimony from both FirstEnergy and Union witnesses that the wage negotiation was centered around achieving parity

between BMP employees and FirstEnergy employees at other power generation facilities. As Cookson explained, it had been a consistent theme of the Union since 2012, and particularly at the bargaining sessions in December 2014 and throughout 2015, to lessen the wage disparity between BMP bargaining unit employees and Sammis employees. This crucial point, standing alone, undercuts the theory that the wage increases were "inextricably intertwined" with, of all things, retiree healthcare.

Notably, in that regard, the General Counsel's own witness, Dennis Bloom, a mechanic at BMP, admitted that the discussions regarding equity adjustments were raised to move the wage rates closer to those paid at the Sammis facility. This admission fully corroborates Cookson's testimony, which went unrebutted.

It is significant that Marshman—the Union's chief negotiator who had participated in every bargaining session and in numerous meetings with Cookson—was not called to testify on this issue. Indeed, in a different case decided by this Court, the Court took issue with Marshman's credibility when it stated, "In reality, Marshman's comments were cryptic rather than clear." *Ohio Edison Co. v. NLRB*, 847 F.3d 806, 811 (6th Cir. 2017). The underlying ALJ decision, as affirmed by the Board, was even more critical: "I do not find Marshman's testimony regarding their phone conversation to be sufficiently reliable to base findings on it. His testimony was not particularly detailed and his demeanor while testifying was not impressive."

Ohio Edison Co. 262 NLRB No. 88. [10]

Thus, and in short, there is simply no evidence whatsoever to support a conclusion that the wage increases were "inextricably linked" to retiree health care. Retiree health care was not and never was the sole focus of the bargaining, and the record evidence simply does not support it. For all these reasons, the Board's Order related to Case No. 06-Ca-163303 is not supported by substantial evidence and should not be enforced.

D. The Substantial Evidence in the Agency Record Demonstrates that FirstEnergy Lawfully Contracted Out Work in Connection with its Unit 1 Outage

In its Order, the Board also unreasonably concluded that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act by subcontracting work in connection with its planned Unit 1 Outage. The Board's Order rests upon several fundamental errors of law, each of which are independently sufficient to set aside the Order, and certainly when considered together. *First*, FirstEnergy's decision to subcontract work in connection with the Outage was not a mandatory bargaining subject of bargaining. *Second*, the subcontracting was consistent with the terms of the

[10] The Board erred by failing to draw an adverse inference against the General Counsel based upon the failure to call Marshman to testify on this issue. *See*, *e.g.*, *Douglas Aircraft Co.*, 308 NLRB 1217, 1217 n. 1 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge").

Implemented Terms and expired CBA and well-established past practices. *Third*, the Company had provided the Union with notice, and the Union failed to request bargaining.

1. The subcontracting work associated with the Outage was not a mandatory bargaining subject.

Contrary to the Board's findings, not every case of subcontracting is a mandatory bargaining subject. As the Board has stated, the "duty arises only if the change is a 'material, substantial, and a significant' one affecting the terms and conditions of employment of bargaining unit employees." *North Star Steel Co.*, 347 NLRB 1364, 1366 (2006). In adopting the ALJ's decision here, however, the Board held that subcontracting is a mandatory bargaining subject under all circumstances where an employer replaces bargaining unit employees with non-bargaining unit employees. (AP Vol. I, p. 1.) This, quite simply, is not the law. *See*, generally, *Torrington Industries, Inc.*, 307 NLRB 809, 810 (1992) ("There may be cases in which the non-labor cost reasons for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining").

This principle was set forth long ago in the seminal *Fibreboard* case. As the Court explained, since labor costs often motivate an employer's decision to subcontract, employer subcontracting decisions designed to reduce labor costs will generally be considered a mandatory subject of bargaining because such costs are

deemed to be "within the union's control." *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 213-4 (1964).

However, under particular circumstances, an employer's decision to subcontract is not a mandatory subject of bargaining. *See, among many cases, First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 676–78 (1981) (subcontracting not a mandatory bargaining subject where employer's decision was motivated by a need to fill orders and "maintain a healthy, viable business," and such decision did not change the company's "scope and direction" or adversely impact the bargaining unit); *Furniture Rentors of Am., Inc. v. NLRB*, 36 F.3d 1240, 1248-49 (3d Cir. 1994) (holding employer was not required to bargain over subcontracting because decision was based on lower than expected productivity, unacceptable damage to furniture, complaints by customers, and employee theft rather than labor costs); *Oklahoma Fixture Co.*, 314 NLRB 958, 959 (1994), *enforcement denied on other grounds*, *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1037 (10th Cir. 1996) (subcontracting was not a mandatory bargaining subject where employer's decision was motivated by risk of legal liability and losing revenue; as the Board stated: "'[l]abor costs,' even in the broad sense of the term employed by the Board, were not a factor in the decision.").

The holdings in these cases are directly on point here. The decision to subcontract non-bargaining unit work was not prompted by factors "within the

union's control" such as the need to reduce labor costs. Quite to the contrary, using GE was more expensive than having bargaining unit employees perform the work. The unrebutted evidence in the record demonstrates that FirstEnergy decided to subcontract the work to GE because (1) there was not enough manpower available at BMP to perform the work within the necessary time framed allotted by Regulators, and still keep Units 2 and 3 operational, and (2) GE offered a warranty that the Company could not otherwise obtain.

Significantly, and dispositively, the Board made no finding that FirstEnergy's decision to subcontract was based on labor costs. The evidence conclusively demonstrates that, in order to ensure the safe and timely completion of work associated with the Outage, FirstEnergy had no choice but to subcontract the remaining portion of the work.

The great weight of authority cited above (and many others), along with the clear supporting facts, were all ignored by the Board in favor of *Mi Pueblo Foods*, 360 NLRB 1097 (2014), a case where the employer completely and permanently outsourced work ordinarily performed by bargaining unit employees to an outside trucking company. *Id.* at 1098. In *Mi Pueblo Foods*, the Board found that there was "essential continuity" in the employer's operations, and it was no defense that the work was subcontracted to achieve increased efficiency and reduce warehouse congestion. *Id.* Further, the Board found that although there was no immediate

impact on the driver's terms and conditions of work, there was a risk that the employer would continue to freely subcontract work, potentially reducing the bargaining unit and diluting the union's bargaining strength. *Id.*

In stark contrast to the facts in *Mi Pueblo Foods*, FirstEnergy subcontracted only a portion of the Outage work to GE, a project that was scheduled to last 56 days, and the bargaining unit employees were to resume all work on the turbine after the Outage work was completed. Thus, the same "essential continuity" in operations did not exist here as it did in *Mi Pueblo Foods* with respect to the use of subcontractors. Moreover, there was neither an immediate impact nor a risk that the scope of the bargaining unit or the Union's bargaining strength would be diluted. Indeed, the scope of Outage work—involving the complete rebuild of a turbine—only occurs approximately every nine years.

In no way can it be said that FirstEnergy's decision to subcontract a portion of the work on the Outage affected the direction of the business or otherwise negatively affected the bargaining unit in any way. Very much to the contrary, as the record evidence shows, bargaining unit employees performed a significant amount of work in connection with the Outage, including 16,000 hours of overtime work in less than three months, a stunning number reflecting the sheer volume of work that needed to be done within a short time frame. Moreover, bargaining unit employees declined overtime opportunities and, as a result, the Company was forced

to draft employees for overtime. The idea that the bargaining unit employees could have performed the subcontracting work done by GE, in addition to the boiler feed pump work and the normal repair work on Units 2 and 3 has absolutely no basis in reality. Simply to get the work done and in time, FirstEnergy had no choice but to subcontract some of the Outage work to GE.

In sum, the business justification for subcontracting a portion of the Outage work is undisputed and unrebutted, and no bargaining unit employees were adversely affected by the decision. Under such circumstances, the Board erred as a matter of law in finding that the subcontracting work was subject to compulsory bargaining. Thus, the Board unreasonably concluded that FirstEnergy had a mandatory bargaining obligation for subcontracting during the Outage.

2. The subcontracting of work was consistent with the terms of the expired CBA and longstanding past practices.

It is well-settled that when a collective bargaining agreement expires the parties are bound to maintain the existing terms and conditions of employment at the time of expiration. *See, NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Wagon Wheel Bowl, Inc.*, 322 NLRB 525, 526 (1996). As a result, practices that existed during the term of the agreement can lawfully be continued after its expiration, and those practices become part of the *status quo*. *In re Life Care Ctrs. of Am., Inc.*, 340 NLRB 397, 398-99 (2003) (*citing Post-Tribune Co.*, 337 NLRB 1279, 1279-80 (2002)). Thus, "where an employer's action does not change existing conditions—that is,

where it does not alter the *status quo*—the employer does not violate Section 8(a)(5) and (1)" of the Act. *Id.* Here, FirstEnergy acted in accordance with the expired CBA. Accordingly, it could not have violated the Act as a matter of law.

The terms of the expired CBA state, under Article IV:

> It is the policy of the Company not to employ outside contractors for work ordinarily and customarily done by its regular employees where such contacting would result in the layoff or demotion of employees or the reduction of hours of work below forty (40) hours a week.

Thus, under the extant terms of employment, subcontracting is permitted if it does not result in a layoff, demotion, or the reduction of hours below 40 hours a week. There is absolutely no evidence in the Agency Record indicating any layoff or demotion as a result of the subcontracting work performed by GE. To the contrary, the evidence demonstrates that all employees in the of bargaining unit continued to work at least 40 hours a week. Additionally, the great majority of bargaining unit employees worked overtime during the Outage, to the point where they declined overtime and were forced to work overtime.

In its Order, the Board inexplicably rejected this argument in summary fashion as being "untimely raised," as though the Company had not raised it before filing its Exceptions. This is simply wrong. This argument was raised at the very earliest stage of proceedings, in the Company's first position statement responding to the charges. The ALJ even cited Article IV in his decision regarding the

subcontracting, because it had been raised. The entire reason the Company introduced evidence to show the hours worked and overtime declined was because of the obvious applicability of Article VI.

The implemented terms and conditions (*i.e.*, the *status quo* under the expired CBA) made it clear that FirstEnergy could subcontract work when employees worked their full 40-hour work week. Accordingly, FirstEnergy did not violate the Act by subcontracting Outage work. *See, Airo Die Casting, Inc.*, 354 NLRB 8 (2009) ("Here, the parties' [expired] agreement expressly permits the Respondent to subcontract bargaining unit work 'only when such subcontracting does not result in a layoff or [when] there are no employees on layoff.' We find that the express language of the parties' contract should be construed as a clear and unmistakable waiver of the Union's right to bargain over the Respondent's decision to subcontract bargaining unit work when no employees are on layoff or laid off as a result.").

Further, the subcontracting of work during the Outage was consistent with longstanding past practices. The ALJ recognized in his decision adopted by the Board that Outage work is performed by a combination of bargaining unit employees and subcontractors. (AP Vol. I, p. 10.) Historically, FirstEnergy has always used subcontractors to augment its maintenance workforce during outages. As FirstEnergy clearly demonstrated at the hearing, the Outage was unlike any other outage at BMP in approximately 10 years. Because of that, and because the other

two units, Units 2 and 3, were still operational during the Outage, the project required more manpower than any other outage in FirstEnergy's recent history. These operational issues necessarily mandated that FirstEnergy expand its use of subcontractors in order to complete the project on time.

Under these exact circumstances the Board has found that an employer did not violate the Act where the subcontracting did not "vary significantly in kind or degree" from what had been customary under established past practice, since it had "no demonstrable adverse impact on employees in the unit." *Westinghouse Electric Corp.*, 150 NLRB 1574, 1577 (1965); *see, also, San Antonio Portland Cement Co.*, 277 NLRB 309, 314 (1985) (subcontracting of front end loader work had no detrimental impact on employee wages or other working conditions and therefore did not require bargaining).

The evidentiary record plainly demonstrates that the subcontracting of Outage work did not vary "significantly in kind or degree" nor did it have any "demonstrable adverse impact" on bargaining unit employees. Accordingly, FirstEnergy was permitted as a past practice to subcontract work to GE as a matter of law. For all these reasons, the Board's Order should not be enforced.

3. The substantial evidence in the Agency Record demonstrates that FirstEnergy provided ample notice to the Union regarding the subcontracting of Outage work and the Union failed to timely request bargaining.

Finally, and as equally important as the previous two points on this issue, the

Board order also unreasonably concludes that FirstEnergy failed to provide adequate notice of the subcontracting of Outage work to the Union and an opportunity to bargain. A recent case from this Court, involving the same two parties as here, and decided after the ALJ issued his Opinion, makes this point abundantly clear.

Generally, an employer violates the Act if it makes a unilateral change without first giving the Union notice and an opportunity to bargain. *Katz*, 369 U.S. at 743. It is well-settled, however, that "[w]hen an employer gives notice of a proposed change in terms and conditions of employment, the union must act with due diligence in requesting bargaining." *YHA, Inc. v. NLRB*, 2 F.3d 168, 173 (6th Cir. 1993) (*citing Jim Walter Resources, Inc.*, 289 NLRB 1441, 1442 (1988)). "Notice of four to eight days has been found sufficient to provide a meaningful opportunity to bargain." *Id.*

In 2017, a case concerning the same two parties involved here came before this Court, *Ohio Edison Co. v. NLRB*, 847 F.3d 806 (6th Cir. 2017).[11] In that case, the same union president, Herman Marshman, had claimed the Company had changed a term and condition of employment without bargaining. The Board found in favor of the Union, but the Court unanimously reversed. The Court found that Marshman never made a request to bargain over several alleged unilateral changes.

[11] The case involved the Petitioner here and another subsidiary of FirstEnergy, Ohio Edison Company, and the case was consolidated under the name of the latter.

Id. at 811-12. In sharp language, the Court said "the Board's two-member majority neglected to consider all the circumstances here" and that "[t]he surrounding circumstances only undermine the Board interpretation of [the issues.]" *Id.* at 810-11. The Court concluded that "the [r]ecord instead supports the view" of the Board's dissenting member in that case, "that Marshman never actually requested bargaining over the alleged unilateral change. *Id.*

The Board made a similar error here in finding that FirstEnergy failed to provide adequate notice and an opportunity to bargain. Here, all of the evidence adduced at the hearing—which is unrebutted and uncontradicted—shows just the opposite: that FirstEnergy provided notice to the Union of its subcontracting plans in accordance with FirstEnergy's past practice—and well in advance of the work being performed—and the Union once again failed to request bargaining.

The Union had notice as early as February 6, 2015—more than a year before work commenced on the Outage—that FirstEnergy planned to subcontract a portion of the work associated with that particular outage:

> Q. (Mr. Easley) Let me ask it this way: Did the company notify the union on February 6th of 2015 that there would be contractors working at the Bruce Mansfield site during the 2016 outage?
>
> A. (Mr. Cox) Yes.

(AP Vol. I, p. 324:12-5.) Given that the Union clearly knew that FirstEnergy planned to subcontract Outage work, the Union had an obligation to request

bargaining about it. As the record reflects, however, the Union never did.

More than that, FirstEnergy provided no less than ten (10) notification reports to the Union regarding subcontracting, on February 6, June 5, July 6, September 14, September 18, September 28, October 2, October 9, November 6 and November 20, 2015. This is the historical past practice the parties use to keep the Union informed about subcontracting. Further, FirstEnergy also met every Wednesday with the Union to discuss subcontracting, even after the CBA expired.

The Company also held three "all hands" meetings on June 15, 2015, which were attended by the maintenance department, including the instrument and test group, electricians, and mechanics who are members of the bargaining unit. Finally, on February 10, 2016, FirstEnergy, at the weekly contractor information meeting, specifically informed the Union that GE would be performing the turbine work and boiler feed pump work associated with the Outage. Importantly, this notice was also directly in line with FirstEnergy's past practice of discussing subcontracting work with the Union, and still a month prior to the start of the planned outages.

To a man, each supervisor testified that at no time prior to or after FirstEnergy's various notices to the Union, including at the February 10, 2016 meeting, did the Union ever request bargaining. Cox, Miller, and Easley each testified that the Union was silent regarding the subcontracting work going to GE related to the Unit 1 turbine. Neither the General Counsel nor the Union presented

any evidence that the Union requested bargaining. Rather, the only testimony adduced was that the Union *protested* the decision, believing that the work should be done by bargaining unit employees, and filed an unfair labor practice charge. Indeed, the best of the General Counsel's evidence, introduced through Union representative Bloom, shows only that the Union complained that the work contracted out to GE was bargaining unit work, that the Union wanted the work, and that FirstEnergy should hire more employees and force more employees to work overtime.

This is precisely the exact same habit of the same Union president that was rejected by this Court. As this Court stated very clearly in *Ohio Edison Co.*, a protest, even the filing of an unfair labor practice charge, does not amount to a request to bargain. "The difference between the two is straightforward: to protest is to seek change by expressing disapproval; to request bargaining, in contrast, is to seek change by signaling a willingness to offer something in return." *Id.* at 810 (emphasis added). Board law is also replete with this fundamental requirement that the Union must actually seek to bargain, and not just throw up its hands. *See, e.g.*, *Associated Milk Producers*, 300 NLRB 561 (1990) ("It was incumbent upon the Union to request bargaining—not merely to protest or file an unfair labor practice charge."); *Clarkwood Corp.*, 223 NLRB 1172 (1977) (no violation where union "contacted Respondent and protested its contemplated actions" but "at no time did

employee representatives request Respondent to bargain about removing the phones or closing the restroom."); and *The Emporium*, 221 NLRB 1211 (1975) (no violation where union "simply requested that Respondent not contract out," complained, and asked whether Respondent "would do something about this," but never actually requested bargaining).

Clearly, Bloom's protests and the Union's filing of an unfair labor practice charge does not fulfill its obligation to request bargaining. The Union in this case, just as it did in the case decided by this Court only a short time before the ALJ's ruling here, failed to request bargaining.

Perhaps aware of this crucial point, and to avoid its import, the Board adopted the ALJ's reasoning that subcontracting work was a *fait accompli*. The basis for this finding rests almost entirely upon a purchase order FirstEnergy entered into with GE on November 13, 2015, to do the Outage work. (AP Vol. I, p. 17.) This finding ignores the record evidence and also cuts against basic business and industry practice.

After entering into the purchase order with GE to perform the turbine rebuild work as well as the inspection and overhaul of the boiler feed pump turbine, FirstEnergy decided, following the January 2016 meeting with the Union, that its own bargaining unit employees would perform the inspection and overhaul of the boiler feed pump turbine. That the Company could and did change the terms of the

purchase order undermines the conclusion that either FirstEnergy's decision to use GE for subcontracting work was non-negotiable or that it was unable to extricate itself from the purchase order. Neither is true, based on a clear reading of the Agency Record. Under such circumstances, an employer's proposals cannot be called a *fait accompli*. *See, e.g.*, *Paulstra CRC Corp.*, Case No. 07-CA-47365, 2004 NLRB LEXIS 492 (rejecting the General Counsel's *fait accompli* argument because the evidence showed that the change was "not set in stone and could be changed").

It also is not unlawful for an employer to present a proposed decision in the form of a fully developed plan, "[e]ven [after] informing a union that its position would not change." *The Boeing Company*, 337 NLRB 758, 763 (2002) (*citing Alltel Kentucky, Inc.*, 326 NLRB 561 (1990)). Directly on point is *The Emporium*, 221 NLRB 1211, 1214 (1975), a case in which the Board rejected the *fait accompli* argument because there was "no evidence . . . that in fact [r]espondent's decision to contract out was irrevocable or that [r]espondent would not have bargained in good faith. The [u]nion never tested [r]espondent's willingness to satisfy its bargaining obligation in this respect." Further, the Union's subjective belief that the decision was *fait accompli* does not carry the day or relieve it of its obligation to request bargaining. *See, KGTV*, 355 NLRB 1283, 1285 (2010) (rejecting ALJ's finding of *fait accompli* and concluding the union's "subjective belief' that the employer had already made the decision, *i.e.*, that "the horse had already left the stable," was not

a *fait accompli*). As such, the Board's finding that FirstEnergy violated the Act because it failed to specifically provide notice of the subcontracting to GE before it signed the purchase order is unreasonable.

The evidence plainly demonstrates that FirstEnergy retained flexibility to assign work to bargaining unit employees right up to and through the Outage. Even though it had initially decided to subcontract the overhaul of the boiler feed pump turbine, the Company nevertheless decided to have bargaining unit employees perform the work on the boiler feed pump turbine. The subcontracting was thus not a *fait accompli*, and accordingly, the Union's failure to request bargaining cannot be excused.

CONCLUSION

Based on the foregoing, the Board's decision in its Order is not supported by substantial evidence. Accordingly, FirstEnergy's petition for review should be granted and the Board's Order should not be enforced.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure and Sixth Circuit Rule 32(a), the undersigned counsel certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 9,847 words excluding the parts of the brief exempted by Fed. R App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared using Microsoft Word 2010 for Windows in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

A copy of the foregoing was filed electronically on the 1st day of October 2018 and served according to the Court's Electronic Filing guidelines.

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